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Supreme Court of the United States

October Term, 1941

No. 306

JOSEPHINE S. PEARCE

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

GORDON S. P. KLEEBERG
Attorney for Petitioner

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No.

JOSEPHINE S. PEARCE,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on June 4, 1941, affirming the order of the United States Board of Tax Appeals which determined the presence of deficiencies in the 1935 and 1936 income tax returns of petitioner.

Statement

In the Circuit Court, two opinions were rendered, a majority opinion (per CHASE, C. J., concurred in by AUGUSTUS N. HAND, C. J.—pp. 49-52, Rec.) and a dissenting opinion per (L. HAND, C. J.—p. 52, Rec.).

The majority opinion contains an apt "summary and short statement of the matter involved". Except as indicated, we adopt it, interpolating therein (and in the remainder of this "Statement") appropriate parenthetical references to the folios of the Record. It reads as follows:

"The petitioner, a resident of the City of New York (38), is the divorced wife of William G. Pearce (38) who is also a resident of New York City (38). In 1913, while they were still married but were not living together and were childless (39, 42), the husband created a trust to provide for the separate support of his wife for life to the extent of payments to her of $350.00 monthly and to be in lieu of all her dower or other rights in any property owned by him or by them together and in discharge of all her claims upon him for support and maintenance (42, 54-78). By a supplemental trust agreement made in 1916, the monthly payments were increased to $500.00 and the husband was given the option to terminate the trust and all the claims of the beneficiary wife upon it or upon him by purchasing and delivering to the wife an annuity contract under which one of several designated insurance companies agreed to pay to the wife the sum of $500.00 monthly during her life (43, 81-91). Within a few days after the making of this supplemental agreement, the wife, who had acquired a residence in Texas" in 1914 (the majority opinion said, instead, "for that purpose") "brought her petition in a Texas court for an absolute divorce (39, 40). The husband entered his appearance in that action and in due course such a divorce was granted to the wife on Jan. 13, 1917 (40-2, 46-51). The decree was silent as to property rights; alimony or support and maintenance of any kind, (50-1). There was no express retention of jurisdiction for such purposes (50-1).

"Thereafter, and on May 1, 1917, the husband purchased and delivered to his former wife an annuity in

one of the insurance companies mentioned in the supplemental agreement payable to her in the amount of $500.00 each month so long as she lived (43-4, 95-7). He paid a lump sum for the annuity and was entitled to no return of premium or payment of any kind upon her death or at any other time (43, 95). Payments have been made by the insurance company and received by the wife regularly ever since in accordance with the terms of the annuity contract (44).

"Neither the husband nor the wife included such payments made to her in the years 1935 and 1936 in their income tax returns (102, 105). The Commissioner included such payments in the gross income of each for those years and notified each of the deficiency so created (102, 105). Both appealed to the Board for a redetermination and the two appeals were heard together (105-6). The Commissioner conceded at the hearing before the Board that the deficiency determined in the income of the former husband was erroneous and insisted that that in the income of the former wife was correct (105). The Board redetermined the deficiencies in accord with the position of the Commissioner (108) and the former wife brought * * * petition to review the redetermination of the deficiency in her income" (112-131).

The Board of Tax Appeals rendered an opinion (100-8) which was promulgated June 14, 1940 (100, 110) and entered its order on June 15th, 1940 (109-11).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 4, 1941 (p. 53, Rec.). The jurisdiction of THIS COURT is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347).

The Questions Presented

In *Douglas* v. *Willcuts* (296 U. S. 1) THIS COURT held that moneys paid to a wife from a trust fund established by her husband to provide support for the wife is his income and not hers for tax purposes. In *Helvering* v. *Fitch* (309 U. S. 149) and *Helvering* v. *Leonard* (310 U. S. 80), THIS COURT held that he who would avoid that general rule has "a distinct burden of establishing not by mere inference and conjecture, but by 'clear and convincing proof'" that local law and the provision made "have given the divorced husband a full discharge" leaving "no continuing obligation however contingent".

The questions presented are:

(1) Whether "the ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934)" (quoted from the majority opinion below [p. 51, Rec.]), notwithstanding the *Douglas* rule, makes such moneys received by a wife her income, presumptively, so that the burden of showing the contrary is upon her.

(2) Whether the fact, that a determination of the Commissioner is presumptively correct (*Welch* v. *Helvering* [290 U. S. 111]; *Wickwire* v. *Reinecke* [275 U. S. 101]), places upon a taxpayer, seeking to avoid such a determination, the burden of showing, if that is her contention, that her set of facts, falls within the *Douglas* rule; or whether the rule of *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, avoids that burden for her and places the burden upon the Commissioner (as it does upon a husband-taxpayer), if he would avoid the *Douglas* rule, to establish "not by mere inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge."

(3) Whether the fact that the Commissioner has been upheld by the Board of Tax Appeals has any effect upon the resolution of the two problems presented in questions "1" and "2".

Reasons for Granting the Writ

1. The decision of the Circuit Court is in direct conflict with the decisions of THIS COURT in *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*. In both these cases, THIS COURT ruled that the one who "desires to avoid the general rule expressed in *Douglas* v. *Willcuts*, *supra*, * * * carries a distinct burden of establishing not by more inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge" (p. 86 of the *Leonard* case).

In the instant case, the majority opinion has held that the burden was upon the wife, petitioner herein, who not only does not desire such avoidance but actually strives for the benefits of the *Douglas* rule (to show she was within the rule) and not upon him (the Commissioner) who, in fact, is the one who "desires to avoid the general rule".

2. The majority opinion of the Circuit Court has, by the manipulation of presumably conflicting presumptions nullified the effect of *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, while indeed presuming to defer to the principle enunciated in both. Because the tax "deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband, but because they have been put into that of the divorced wife who actually did receive them" (p. 51, Rec.), the majority opinion held that the "ordinary rule that gross income includes income 'derived from any source whatever' (Section 22(a) of the Revenue

Act of 1934)" and the rule that "the determination of the Commissioner is presumptively correct * * * *Welch* v. *Helvering*, 290 U. S. 111; *Wickwire* v. *Reinecke*, 275 U. S. 101", overwhelm the *Douglas* rule and require of the petitioner that she show that her case is an exception to the rule of the cited section, and that she bear "the burden to show error" on the part of the Commissioner.

3. The dominance of the *Douglas* rule over the two rules invoked by the Circuit Court (reason "2", *supra*) or its inferiority to them is an important question of federal law which, so far as our research has revealed, has not been, but should be, settled by THIS COURT (unless, as we firmly believe, THIS COURT has already in *Helvering* v. *Fitch* and *Helvering* v. *Leonard*, both *supra*, settled the question in a manner contrary to the contentions of the majority opinion).

4. The dissenting opinion of L. HAND, *C. J.* (p. 52, Rec.), should be considered by THIS COURT and sustained for guidance in future similar situations.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, July 11th, 1941.

GORDON S. P. KLEEBERG,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

(Figures in parentheses refer, when preceded by "p" or "pp", to the page or pages, otherwise to the folios, of the printed Transcript of Record)

Opinions Below

The opinion of the Board of Tax Appeals (100-108) is reported in 42 B. T. A. 91.

The opinions of the Circuit Court of Appeals (majority opinion, pp. 49-52; minority opinion, p. 52) are reported in 120 Fed. (2d) 228.

Statement

The relevant record facts and the facts with regard to the jurisdiction of THIS COURT are both stated in the petition.

Specification of Errors

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred

(1) In holding that "the ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934)" (quoted from the majority opinion [p. 51]), notwithstanding the *Douglas* rule (*Douglas* v. *Willcuts* [296 U. S. 1]), makes moneys received by a wife from an annuity established by her husband for her support, her income presumptively, so that the burden of showing the contrary is upon her.

(2) In holding that the fact, that a determination of the Commissioner is presumptively correct (*Welch* v. *Helvering* [290 U. S. 111]; *Wickwire* v. *Reinecke* [275 U. S.

101]), places upon a taxpayer, seeking to avoid such a determination, the burden of showing, if that is her contention, that her set of facts, falls within the *Douglas* rule; and that the rule of *Helvering* v. *Fitch* (309 U. S. 149) and *Helvering* v. *Leonard* (310 U. S. 80) does not avoid that burden for her and does not place the burden upon the Commissioner (as it does upon a husband-taxpayer), if he would avoid the *Douglas* rule, to establish "not by mere inference and conjecture, but by 'clear and convincing proof' that local law and the alimony trust have given him (the husband) a full discharge" (quoted from the *Leonard* case, p. 86).

(3) In holding that the fact that the Commissioner has been upheld by the Board of Tax Appeals fortifies the holdings, "1" and "2", *supra.*

Summary of Argument

The Commissioner had the "distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust (the annuity plan herein) have given him (the husband) a full discharge" but he failed to carry that burden. Petitioner had no burden to show the contrary.

The income herein was petitioner's husband's, not hers.

Argument

Douglas v. *Willcuts,* 296 U. S. 1, is the leading authority on the taxability of so-called "alimony trusts" and holds that

> "the net income of the trust fund which was paid to the wife * * *, stands substantially on the same footing as though he [husband] had received the income personally and had been required by the decree to make the payment directly."

It is respectfully submitted that although the opinion in that case was, of necessity, couched in terms of "trust", the principle there laid down is not restricted to that particular method of satisfying an obligation. *Douglas* v. *Willcuts* (*supra*, at p. 9), we respectfully submit, stands for the proposition

> "that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor."

In the case at bar, it is to be noted that by the original trust agreement (54-80) and by the supplemental agreement (81-94) the monthly payments to petitioner were in discharge of all claims including that for alimony, support and maintenance which petitioner might have against her former husband.

The annuity is nothing more than a substitution of one form of security for another, the corpus of the trust. Regardless of the method employed, it is still but a plan whereby petitioner received moneys in satisfaction of all claims she might have against her husband for support. Whether the moneys are paid to petitioner by a trustee under a trust agreement, or by an insurance company under an annuity provision, the transaction is still to be regarded as being the same in substance as if the money were being paid to the husband in the first instance and transmitted by him to his wife.

And by virtue of the rule enunciated in *Douglas* v. *Willcuts*, *supra*, the money received is to be regarded as the husband's income taxable to him, and to him alone.

In *Helvering* v. *Fitch* (309 U. S. 149) THIS COURT (at p. 151) again expressed this same thought conceiving the

amounts paid to a wife "as paid in discharge of the general obligation to support" which the husband has.

The entire tenor of the *Fitch* case is to the effect that there is a presumption that a husband, upon divorce, continues liable to support his wife and will be taxed on moneys received by the wife from a trust created by him to provide the wife with such support, unless there is clear and convincing proof that the husband received a discharge under local law.

The *Fitch* case and the authorities following it clearly indicate that not only the trust instrument but also local law must give the husband a discharge to overcome such presumption.

As was stated in the *Fitch* case, *supra*, at page 156 (*italics ours*):

> "Enough has been said to show that respondent has not sustained the burden of establishing that his case falls outside the general rule expressed in Douglas *v.* Willcuts, *supra*. If we were to conclude that this case is an exception to that rule we would be acting largely on conjecture as to Iowa law. * * * That we cannot do. *For if such a result is to obtain, it must be bottomed on clear and convincing proof, and not on mere inferences and vague conjectures, that local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent. Only in that event can income to the wife from an alimony trust be treated under the revenue acts the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation—unless of course Congress decides otherwise.*"

The presumption of continuing obligation to support may have been recognized in the decision of the Circuit Court (and in that of the Board of Tax Appeals) but in a manner that gives only lip service to the presumption.

Said the Circuit Court majority opinion (p. 51):

"These principles (i. e. the principles above expounded) are, of course, decisive where they are applicable and decision here must depend upon how they apply to a situation where the deficiency as redetermined has resulted not from an inclusion of payments made to the divorced wife in the gross income of the former husband but because they have been put into that of the divorced wife who actually did receive them. The ordinary rule that gross income includes income 'derived from any source whatever' (Sec. 22(a) of the Revenue Act of 1934) is also a general one and to be given effect unless an exception excludes it. Moreover, the determination of the Commissioner is presumptively correct and the burden to show error rests upon the petitioner. Welch *v.* Helvering, 290 U. S. 111; Wickwire *v.* Reinecke, 275 U. S. 101.

"The Commissioner having determined the deficiency by including the payment in the gross income of the recipient and the Board having upheld the Commissioner, the petitioner now cannot relieve herself from the resulting taxation unless she can show that the decision under review was erroneous. Although she might show error by submitting clear and convincing proof that the payments she received did discharge a continuing obligation of her husband to provide for her support even after the decree of divorce so as to make the rule of Douglas *v.* Willcuts, *supra,* applicable in accordance with the decisions in Helvering *v.* Fitch and Helvering *v.* Leonard, both *supra,* she, being faced with the burden of overcoming an adverse decision of the Board, cannot prevail merely by showing that such an obligation upon the husband might have existed under Texas law. She was bound to show with such clarity that it did that the failure of the Board to recognize it and give it effect was error."

In other words, as we read the above excerpt, it was the opinion of the majority of the Circuit Court that it is a petitioner as such, who seeks to be relieved of a de-

ficiency sought to be imposed upon her, who has the burden of proving, by "clear and convincing proof", the effect of "local law and the alimony trust" upon the "continuing obligation however contingent" of the divorced husband. It is not to be the one who desires to show "that his case falls outside the general rule expressed in *Douglas* v. *Willcuts, supra*", who has the burden of establishing that it does.

If, as is the fact is this case, it is the wife who seeks to escape taxation, then she must establish that her case falls (not "outside" but) *within* that general rule.

From all this, something of an absurdity must result. For example in the instant situation, the husband was also a petitioner (105-6; see also statement of facts in majority opinion, p. 50). If the husband, as petitioner, failed in his proof and the wife, as petitioner, in hers, who is to pay the tax? Both, if the Circuit Court majority opinion is right.

Actually of course, the absurdity never eventuates, because the principle involved is a substantive matter. The law presumes continuing liability of a husband to support his wife, of a father to support his child, and one who would rebut that salutary presumption, be he petitioner or respondent, husband or wife—has the burden to do so.

This is plainly the intent, the point of departure, of the *Fitch* case, as a reading of the whole opinion plainly indicates.

Accordingly, in the instant situation, if the husband, as petitioner, would claim rights based on release it was his burden and if the Commissioner, as respondent, would claim rights based on release, it was his burden also. Virtually, if not in form, wife and husband oppose each other here and he and not she must rebut the presumption.

In *Helvering* v. *Leonard*, 310 U. S. 80, the Court at page 86, commenting on the principle of presumption and burden of proof in the *Fitch* case said:

> "In Helvering *v.* Fitch, *supra*, we stated that where the divorced husband desires to avoid the general rule expressed in Douglas *v.* Willcuts, *supra*, he carries a distinct burden of establishing not by mere inference and conjecture but by 'clear and convincing proof' that local law and the alimony trust have given him a full discharge."

Since petitioner does not desire "to avoid the general rule", she does not carry the burden. Since respondent does desire "to avoid the general rule", he does carry that burden.

Welch v. *Helvering* (290 U. S. 111) and *Wickwire* v. *Reinecke* (275 U. S. 101), cited in our above excerpt from the majority opinion, establish no more than a practical rule of procedure in proof-giving applicable generally in these tax controversies.

To be sure, generally, "the decision of the Commissioner of Internal Revenue • • • furnished *prima facie* evidence of its correctness" (*Wickwire* v. *Reinecke, supra*). It is evident good sense that the burden of going forward should fall upon the taxpayer. But having said that, we have said no more than what is usually said when it is stated that a plaintiff has the burden of proof in any action.

How does a plaintiff in any action meet his burden of proof? Obviously, by proof or, when circumstances so indicate, by the expedient of presumptions.

In the instant case, petitioner has not shunned her burden of proof within the meaning of the *Welch* and *Wickwire* cases. By no means. But in carrying her burden, she has resorted to a presumption, to-wit: "the general rule expressed in *Douglas* v. *Willcuts*" (quoted from *Helvering* v. *Fitch, supra*). And that general rule, as was stated in said *Fitch* case "is clear. Amounts paid to a divorced wife • • • are not regarded as income of the wife, but as paid in discharge of the general obligation to support • • •."

Having resorted to "the general rule", petitioner has met the requirements of the *Welch* and *Wickwire* cases, that she show that the ruling of the Commissioner of Internal Revenue is wrong. Who "desires to avoid the general rule" (quoted from *Helvering* v. *Leonard*, 310 U. S. 80, 86)? Certainly not petitioner.

And as we have pointed out, if respondent would "avoid the general rule", it is his burden to do so.

The dissenting opinion of the Circuit Court said (p. 52):

> "As I read Helvering *v.* Fitch, 309 U. S. 149, and Helvering *v.* Leonard, 310 U. S. 80, the husband is liable in these cases not only when the settlement does not discharge his marital liability, but when the law of his domicil leaves it uncertain whether the settlement has done so."

We go even further than this, and say that even if the record were entirely silent as to the effect of local law or as to whether the local law is uncertain, the general rule of *Douglas* v. *Willcuts, supra,* controls.

This brings us to the implication of the majority opinion that somehow "the ordinary rule that gross income includes income 'derived from any source whatever'" affects this situation. We ask: how can it? Didn't that rule exist when *Douglas* v. *Willcutts* was decided? Doesn't it exist always? If it is to give us pause, then what meaning shall be attached to the *Douglas* rule?

If all receipts whatever are to be presumed income, then we certainly cannot indulge the presumption (of the *Douglas* case) that income received by a wife from her husband or his devices is not her income.

Again, we ask, what significance can be attached (as the majority opinion has done [p. 51]) to the fact that the Board of Tax Appeals has upheld the Commissioner?

What was reviewed by the Circuit Court is precisely the propriety of that upholding. One cannot justify a result by assuming the accuracy of that result in one's syllogism.

Could a showing of release of petitioner's husband under Texas law be made, by the "clear and convincing proof", the *Fitch* case called for?

The dissenting opinion of the Circuit Court says (p. 52):

> "We all agree that the law of Texas is uncertain as to whether the taxpayer's husband discharged himself of his marital liability by the settlement at bar."

The majority opinion says (p. 51):

> "In this respect all that does appear, however, is doubt and uncertainty."

The Texas statute, *eo nomine*, does not provide for alimony (excepting *pendente lite*), but, by way of permanent care of a divorced wife, the Texas courts can, after the decree of divorce,

(a) Award a divorced wife the equivalent of alimony, by directing the divorced husband to pay her weekly, monthly or annual payments for life.

Johnson v. *Johnson*, 14 S. W. (2) 805, requiring periodical payments, after divorce for wife's support; *Levy* v. *Goldsoll*, 131 S. W. 420; *Berg* v. *Berg*, 115 S. W. (2) 1171, awarding divorced wife $17.50 a month out of husband's railroad pension of $59.50 per month; *Keton* v. *Clark*, 67 S. W. (2) 437; *Scannell* v. *Scannell*, 117 S. W. (2) 538; *Daniel* v. *Daniel*, 30 S. W. (2) 801; *Wiley* v. *Wiley*, 33 Tex. 358, awarding the wife annually for life or until remarriage $100 annually; *Clark* v. *Clark*, 35 S. W. (2) 189, awarding the wife $25.00 a month.

(b) Order the division of community property between the divorced couple.

Article 4638, *Texas Revised Civil Statutes; Askew* v. *Rountree*, 120 S. W. (2) 117; *Berg* v. *Berg, supra.*

(c) Direct division between them of their separate estate (individually owned personal property) and establish a trust on the rents and income from separately owned real property.

Ex parte Scott, 123 S. W. (2) 306; *Blair* v. *Blair*, 105 S. W. (2) 331; *Hedtke* v. *Hedtke*, 112 Tex. 404, 248 S. W. 21; *Berg* v. *Berg, supra; Keton* v. *Clark, supra; Clark* v. *Clark, supra.*

(d) Combine several of the foregoing methods.

Helm v. *Helm*, 291 S. W. 648; *Ex Parte Scott, supra; Berg* v. *Berg, supra;* 15 *Texas Jurisprudence*, p. 587, Sec. 110 and

(e) apparently hold jurisdiction to alter the final decree of divorce, in any respect at any time.

Cannon v. *Cannon* (121 Tex. 634), a decision of the Supreme Court of Texas on an appeal from a decision of the Court of Civil Appeals reported in 43 S. W. (2) 134.

In Chapter 3, Title 37, Article 1728 of the *Texas Revised Civil Statutes*, which defines the jurisdiction of the Supreme Court of Texas, there appears the following (*italics ours*):

> "In all cases where the judgment of the Court of Civil Appeals is a correct one, and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court shall *refuse the application;* in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall *dismiss the case for want of jurisdiction.*"

In other words, if both result and reasoning are correct, the Supreme Court *refuses the application.* If the result is correct, but the reasoning of the opinion below appears wrong to the Supreme Court—in other words, the law has not been correctly stated by the lower court, then the Supreme Court *dismisses the case* because the result, *i. e.*, the judgment of the lower court would remain unchanged.

In said *Cannon* case, in the District Court, "Appellee was granted a divorce from appellant, and obtained a judgment against him for certain property real estate, notes * * *" (quoted from the opinion of the Court of Civil Appeals). It will be noted that this was a property settlement, as was the annuity in the instant case. After the judgment and upon the application of the wife, "The original judgment was so corrected as to give appellee a one-half interest in corporate stock and shares" (also quoted from the opinion of the Court of Civil Appeals).

The Court of Civil Appeals in considering this addition to the original judgment, disapproved of it and said:

> "To hold that judgment can be added to at any subsequent term in the absence of fraud or mistake would destroy the finality of any judgment and produce a chaotic condition in the acts of any court. If property can be added to an inventory in any case after the term has ended, it could be pursued indefinitely."

On appeal to the Texas Supreme Court, the case was "Dismissed for want of jurisdiction, April 6, 1932" (121 Tex. 634).

The majority opinion below said with regard to this (p. 52):

> "Under the practice then prevailing such a decision could have meant either that the Supreme Court disagreed with the reasons given in support of the judgment below or held that it actually had no jurisdiction of the appeal."

Actually, in view of the plain language of Art. 1728, *supra*, the decision meant that the Supreme Court had no jurisdiction of the appeal because it found "the judgment • • • a correct one, but • • • not • • • that the opinion • • • correctly declared the law".

In the Circuit Court, even respondent cited two instances (*Gray* v. *Thomas*, 83 Tex. 246, 18 S. W. 721; *Whetstone* v. *Coffey*, 48 Tex. 269) where "a wife was permitted to assert rights in community property which had not been divided at the time of the divorce" (quoted from respondent's brief in the Circuit Court).

In view of the foregoing, it is respectfully submitted (a) that petitioner had no duty to show that her husband was not released from his natural obligation to support her; (b) that respondent had the duty to show release and has not done so; (c) that Texas law provides continuing liability in petitioner's husband; and, (d) in any event, that the presumption of continuing liability must lead to a holding that petitioner's husband, and not petitioner, is taxable on the annuity payments received by petitioner in lieu of support and maintenance.

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

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Attorney for Petitioner.